No. 75-246

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

ALICE R. HOPKINS, SPECIAL ADMINISTRATOR OF THE ESTATE OF ROY C. HOPKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In our main brief we showed that the Court of Claims should have dismissed this suit for lack of jurisdiction, since the 1970 amendment to the Tucker Act, which provides that an express or implied contract with the exchange service shall be considered an express or implied contract with the United States, is inapplicable to exchange service employees whose employment, like that of other federal employees, is not based upon a contractual relationship with the government. We submit this reply brief to respond to respondent's contention (Resp. Br. 51-54) that, notwithstanding the inapplicability of the 1970 amendment, the Court of Claims nevertheless had jurisdiction because the claim advanced by respondent's deceased husband was founded upon the Constitution or upon a regulation of an executive department.

As we demonstrated in our opening brief, the Tucker Act does not itself create any substantive right, enforceable against the United States, to "actual, presently due money damages" (*United States* v. *King*, 395 U.S. 1, 3), but merely confers jurisdiction on the Court of Claims whenever such a substantive right otherwise exists. The Court of Claims has no jurisdiction where "the basis of the federal claim—be it the Constitution, a statute, or a regulation—cannot be held to command, in itself and as correctly interpreted, the payment of money to the claimant, but in which some other principle of damages has to be invoked for recovery." *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1008 (Ct. Cl.); accord, *Mosca* v. *United States*, 417 F.2d 1382, 1386 (Ct. Cl.).[1]

[1]The Tucker Act provides that a claim of entitlement to money damages must be "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort" (28 U.S.C. 1491).

In our opening brief we showed that respondent's claim was not founded upon an express or implied contract with the United States, notwithstanding the 1970 amendment to the Tucker Act.

So far as noncontractual cases are concerned, the Court of Claims has said that claims of entitlement to money damages may be grouped into two categories: "those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." *Eastport S.S. Corp.* v. *United States*, *supra*, 372 F.2d at 1007; see also *Clapp* v. *United States*, 117 F. Supp. 576, 580 (Ct. Cl.). Where a claimant seeks the return of his own money, alleged to have been wrongfully collected and withheld by the government, the claimant's recovery would draw upon a "fund" created by the claimant himself. Accordingly, the interests of the general citizenry in preservation of the public fisc are only incidentally involved in such cases since, if wrongfully collected and withheld, the money paid to the government by the claimant could not in theory properly be disbursed to defray the cost of government operations. By contrast, where the claimant seeks recovery from the public treasury of monies not directly derived from payments by him, his recovery would draw upon a "fund" that exists only because of the lawful exercise of the government's power to collect and retain money. In the latter class of cases, therefore, express congressional authority "mandating compensation" is required before the claimant may recover. See *Eastport S.S. Corp.* v. *United States*, *supra*, 372 F. 2d at 1008-1009.

The complaint in this case alleged, *inter alia*, that respondent's husband's discharge from the Army and Air Force Exchange Service denied him due process and violated applicable exchange service regulations (see Resp. Br. 52-53). Those allegations, standing alone, were insufficient to invoke the jurisdiction of the Court of Claims, as that court acknowledged when it observed that, prior to the 1970 amendment, the Tucker Act had not conferred jurisdiction to review discharges of military exchange employees (Pet. App. 2a-4a). The Due Process Clause of the Fifth Amendment does not "command, in itself * * * the payment of money to the claimant," so that even if the constitutional allegations in the complaint were correct the Court of Claims had no jurisdiction to award monetary damages based upon those allegations.[2] Respondent's contention to the contrary, if

[2]*Young* v. *United States*, 498 F. 2d 1211 (C.A. 5), upon which respondent relies in this regard (Resp. Br. 46-47, 54), provides no basis for the proposition that an alleged denial of due process is sufficient to invoke the jurisdiction of the Court of Claims under the Tucker Act. To the contrary, the court in *Young* expressly held that the complaint there, which had alleged, *inter alia*, that the contested discharge from the exchange service had denied due process and violated applicable exchange service regulations, was insufficient to invoke jurisdiction under the Tucker Act (*id.* at 1217) but that the district court nevertheless had jurisdiction to entertain the complaint under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (*id.* at 1218-1223). Although in our view the latter conclusion was incorrect, it does not affect the instant case, which concerns the jurisdiction of the Court of Claims.

accepted, would effectively overrule the well-established rule that a waiver of sovereign immunity from claims against the public treasury cannot be implied but must be unequivocally expressed. *United States* v. *King, supra,* 395 U.S. at 4; *Soriano* v. *United States,* 352 U.S. 270, 276.

Similarly, the regulation governing respondent's employment with the Army and Air Force Exchange Service (AR 60-21/AFR 147-15) does not "command, in itself * * * the payment of money to the claimant" for wrongful discharge. But even if some such right fairly could be implied from the regulation, it would not be sufficient to invoke the jurisdiction of the Court of Claims since it was not promulgated pursuant to an Act of Congress creating such a right. A litigant's right to collect from the public treasury must derive from an Act of Congress.[3] As this Court noted in *United States* v. *U.S. Fidelity Co.,* 309 U.S. 506, 513:

> It is a corollary to immunity from suit on the part of the United States * * * that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.

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[3]An exception, of course, is the Just Compensation Clause of the Fifth Amendment, which confers a right of recovery on persons whose property is taken by the United States in contravention of its terms. See *Jacobs* v. *United States,* 290 U.S. 13, 16.

The statutory authority pursuant to which the regulation governing the Army and Air Force Exchange Service is promulgated, 10 U.S.C. 3012 and 8012, merely authorizes the Secretaries of the Army and the Air Force to conduct the affairs of the two departments. It does not authorize the Secretaries to obligate public funds for the exchange service. Indeed, Congress has expressly prohibited the Secretaries from allocating to the exchange service the funds appropriated for support of the Army and Air Force. 10 U.S.C. 4779(c), 9779(c). Although "post exchanges * * * are arms of the Government deemed by it essential for the performance of governmental functions," nevertheless "[t]he Government assumes none of the financial obligations of the exchange." *Standard Oil Company of California* v. *Johnson,* 316 U.S. 481, 485.

As we indicated in our opening brief, the government has now assumed the contractual obligation of the exchanges by virtue of the 1970 amendment to the Tucker Act which makes contracts with military exchanges contracts "with the United States." But the government has not assumed their noncontractual obligations, for Congress has not authorized, let alone required, payment of such obligations out of the public treasury.[4]

In short, federal employees who allege that they have been discharged in violation of authorized regulations have a claim for money damages for lost wages from the United States that is cognizable in the Court of Claims *only* if the wages of which they were deprived would have derived from the public treasury pursuant to an

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[4]Thus, in *United States* v. *Perkins,* 116 U.S. 483, upon which respondent relies, the claimant recovered in the Court of Claims back pay for allegedly unlawful discharge, where his salary had been duly authorized by Congress. See also *United States* v. *Wickersham,* 201 U.S. 390, 399-400.

Act of Congress.[5] Since in the instant case the lost wages claimed by respondent on behalf of her husband's estate would not have derived from the public treasury pursuant to an Act of Congress, the Court of Claims was without jurisdiction to entertain the claim that the discharge here denied due process and violated applicable Army and Air Force Exchange Service regulations.

For the reasons stated here and in our opening brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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[5]Moreover, to make those obligations payable out of the public treasury would be doubly anomalous in view of the fact that Congress has not placed any limit on the rates of compensation of exchange service employees; to subject the United States to claims for back pay for unlawful discharge of such employees would place the size of disbursements, which were themselves unauthorized and unappropriated, at the discretion of officials of the executive branch.